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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

1970—169

No. 1707

UNITED TRANSPORTATION UNION, an Unincorporated Labor Union, and
C. M. CAGLE,
Petitioners,

v.

ATLANTA AND WEST POINT RAIL ROAD COMPANY and
WESTERN RAILWAY OF ALABAMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The statement in the petition on this subject is adequate.

JURISDICTION

The jurisdictional statement in the petition is adequate.

QUESTIONS PRESENTED

The issues presented on this appeal fall into three major categories: (1) the status of the issue in this court, (2) the applicable substantive law governing the merits, and (3) whether the facts before the lower court warranted the granting of preliminary injunctive relief to an extent such that this Court may not declare the District Court abused its discretion.

The first category in turn may be subdivided:

A. Have facts occurring subsequent to the order appealed from of January 5, 1970 made the issue moot, firstly because the condition subsequent upon which the injunction was to terminate has occurred, and if no order has been issued vacating the injunction against the Union's striking, it is due solely to the failure of the Union to properly present the matter to the District Court; or alternatively, because the parties have completely settled the dispute which was the origin of the present litigation.

B. Whether the Union's appeal of only part of an injunction may be heard when it has acquiesced in and accepted the benefit of the remainder of the injunction, and the injunction is in fact a unit whose components are not subject to such selective severance.

The second and third major questions may be combined and put with more precision:

Whether the District Court has jurisdiction under the Railway Labor Act to enjoin the strike of a railroad union against a railroad over a possible "major dispute," or does Section 4 of the Norris-LaGuardia Act deprive the court of jurisdiction; and if so (i) what legal parameters limit and govern the exercise of such jurisdiction by a United States District Court, and (ii) whether the District Court was so clearly erroneous in its application of the facts to

the controlling law that its judgment should be reversed, or alternatively (iii) if the court was under any erroneous impression as to the law, whether the undisputed facts upon which the court could have acted otherwise support the granting of injunctive relief.

STATUTES INVOLVED

This case involves the Railway Labor Act and parts of the Norris-LaGuardia Act as set out in the petition.

STATEMENT

A. Procedural History

This action was commenced on November 15, 1969 with the issuance of a temporary restraining order which enjoined a strike begun that morning by certain employees of the United Transportation Union (UTU) against the Atlanta & West Point Rail Road (A & WP) and the Western Railway of Alabama (W of A). The temporary restraining order was obeyed by the union, and continued by consent until the issuance, after a hearing on January 5, 1970, of a preliminary injunction which continued to enjoin the strike and directed the parties to follow the bargaining procedures required by the Railway Labor Act.

The injunctive part of the District Court's order read as follows:

> "Accordingly, an injunction will issue against the union until the statutory procedures have been followed and until further order of the court, and both parties shall proceed forthwith to make a good-faith effort to settle in conference their differences with regard to all bargainable proposals for changes which the union served upon plaintiffs in November, 1965."

The union appealed from "that portion of the Order dated January 5, 1970, which preliminarily enjoined the defendants from striking" (App. 150). While that appeal was pending, the Union made an application to the District Court to have the railroad cited for contempt for its alleged refusal to bargain in accord with the remainder of the Order. The application was denied, in an order dated June 29, 1970, a copy of which is attached hereto as Appendix A, the court finding that the railroad had bargained in good faith. Finding that the matter was before the National Mediation Board, the Court expressed doubt of its jurisdiction to rule on the application, apparently out of concern for the exclusive jurisdiction of the Board, but made its ruling for what value it had. That ruling was not appealed.

The Court of Appeals, after a lengthy and extended oral argument which explored every facet of the case, unanimously affirmed the District Court's initial order, holding that the District Court "did not abuse its discretion when it preliminarily enjoined the strike in question."

This petition for certiorari is from that affirmance.

B. Background of the Dispute and Summary of Related Litigation

This is still another case growing out of the conflict between the railroads and the "operating" unions representing some of the railroad employees over the increasingly anachronistic role of the railroad firemen. Between 1956 and 1963, this issue developed with increasing momentum, culminating in a special act of Congress which provided for compulsory arbitration of the future role of the fireman in the railroad industry. That statute, Public Law 88-108, 77 Stat. 132, created an Arbitration Board which made an Award, since known to the parties and many courts as Award 282, which was to be effective as

between all the carriers (including the respondents) and the Brotherhood of Locomotive Firemen and Engineers (BLF & E), a predecessor to the petitioner, United Transportation Union (UTU), until March 30, 1966. Although the railroads paid an extremely high price in the form of termination benefits under the Award, the Award allowed them to eliminate some ninety per cent of the positions for firemen. The firemen themselves were to be separated over a priod of time.

On or about November 15, 1965, the BLF & E served three notices to the railroads under Section 6 of the Railway Labor Act, 45 U.S.C., Section 156 (1964), which, among other things, proposed in substance that upon the termination of Award 282 there would come into effect rules that were substantially similar to the old work rules, with some relatively minor adjustments. At this point, apparently the unions were not sure what rules, if any, would be in effect the day after the Award expired. The carriers similarly were uncertain as to what the situation would be the day after Award 282 expired, and, although preferring to believe that the rules and conditions established under Award 282 would continue after March 30, 1966, "just in case" served counter-proposals on the unions to preserve the benefits the Award had created for them. Some of the railroads (although **not** the respondent railroads) and some of the unions, including the BLF & E, proceeded to litigate these and several other questions in the United States District Court for the District of Columbia. The first question, what rules were in force the day after the Award expired, was decided adversely to the position of the union in the District Court, and the BLF & E appealed that decision. Secondly, the railroads had generally declined to discuss the merits of the BLF & E's notices prior to the termination of the Award, on the ground they had no legal duty to do so. The District Court ruled in favor of the railroads' position, and the

union appealed that likewise. On appeal, the Court of Appeals for the District of Columbia affirmed the District Court in its view that Award 282 created a "new plateau" for bargaining, but ruled that the railroads had had a duty to bargain prior to the termination of Award 282 on March 30, 1966.

This background of facts and litigation is thoroughly and authoritatively described in **Brotherhood of Railroad Trainmen v. Akron & B.R.R.**, 385 F.2d 581 (D.C. Cir. 1967 and 1968), cert. denied, 390 U.S. 923 (hereafter referred to as **Akron**).

While this litigation proceeded on its course; still other litigation was initiated between the BLF & E, the Brotherhood of Locomotive Engineers (BLE), the National Mediation Board (NMB), and some of the other carriers (but **not** the respondents here), attempting to determine whether the BLF & E or the BLE had an exclusive right to contractually arrange an apprentice engineer program with the carriers, and consequently to represent those apprentices. That case was finally decided on April 29, 1969, after which the carriers who were parties to that litigation, feeling that the ruling put them in what the court described as the "unhappy position of having to deal simultaneously with two rival unions whose bargaining demands will very likely conflict . . ." applied for certiorari. Certiorari was denied on October 20, 1969. See **Brotherhood of Locomotive Firemen & Enginemen v. National Mediation Board**, 410 F.2d 1025 (D.C. Cir. 1969) cert. denied, 396 U.S. 878 (hereafter referred to as BLF & E v. NMB).

C. **Facts Leading Up to the Injunction**

The present parties' conduct generally adhered to the patterns described above. The BLF & E served the same three notices upon respondents on November 15, 1965, to

which they responded with a counter-proposal, following which there were some desultory contacts between the parties over whether or not the notices presented issues that were bargainable at that time (App. 348-50). At one point in early 1966, the railroads were willing to begin negotiations if all the notices (both the union's proposals and the railroad's counter-proposals) would be considered together, but the union rejected this offer and stated that conferences on the **union's** proposals had been terminated sometime prior to that date and "could not" be reopened (App. 321-27, 403-06). Although there were some sporadic subsequent suggestions of the union's willingness to cooperate in training apprentice engineers (App. 294), which was also the general subject of the third notice filed by the appellant union on November 15, 1965 (App. 116-18), none of the parties apparently made any serious attempt to reopen negotiations on the question (App. 295, 326-27). The record strongly suggests that the matter rested in that state, not because of a lack of interest or a stubborn refusal to negotiate on the part of any of the parties, but rather because in fact everybody concerned was interested in the outcome of the litigation described above. Obviously, all the parties realized the outcome of that litigation would affect them and hence nothing productive could be done.

Shortly after the denial of certiorari in BLF & E v. NMB, on November 7, 1969, the National Railway Labor Conference (NLRC), the representative of the respondents and the other carriers, made a written offer to the UTU to commence negotiations on the apprentice training program and suggested a time and place for that meeting (App. 49-50). The International President of the UTU in Cleveland, Ohio, in a letter dated November 12, 1969, the day before the meeting date proposed by the NLRC, replied to the effect that the UTU was not prepared to handle the matter on a national basis, and stated that the "sugges-

tion for a meeting should be sent to the General Chairman of those General Committees which sent that Notice" (App. 47-48).

Sometime on November 14, 1969, the International Vice President of the UTU arrived in Montgomery, Alabama, from Cleveland, Ohio (App. 360). Early in the morning of November 15, the Vice President for the first time told the General Chairman of the UTU on the A & WP and the W of A that a strike was set on those railroads for 6:00 A.M. that very morning (App. 360-62).

At 6:00 A.M., the strike commenced (App. 254); that evening (November 15, 1969) a temporary restraining order was issued by the U. S. District Court for the Northern District of Georgia, which was continued by consent, until, after further hearings, the Court issued a preliminary injunction, part of which is appealed in this proceeding. That injunction also ordered (and this part was not appealed) the parties to make "a good-faith effort to settle in conference their differences with regard to all bargainable proposals for changes which the union served upon plaintiffs in November 1965."

D. **Facts Arising Subsequent to the Injunction**

As noted previously, shortly thereafter, negotiations were begun between the parties in conference on the subject of an apprentice training program, which negotiations, upon reaching an impasse on one point, were removed by respondents to the National Mediation Board in early February, 1970.[1]

The NMB docketed the dispute, and assigned a mediator to it who held at least two sessions on the matter. Subse-

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[1] The facts occurring subsequent to January 5, 1969, are recited in the court's order of June 29, 1970 on the contempt application.

quent to this, and prior to the docketing of the petition for certiorari, the parties reached an agreement on an apprentice training program on these two railroads, which agreement was executed on May 7, 1971.[2]

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[2] To complete the major outline of the factual record, although it is not critical to the case, the National Railway Labor Conference on November 19, 1969, on behalf of its member railroads, which include the respondents, requested mediation by the NMB on the dispute growing out of the union's Notice No. 3 (App. 18-50). In response to a request for their views on the matter, the UTU's International President on December 2, 1969, opposed national handling of the dispute and asked that the application filed by the carriers for mediation be dismissed (App. 50-58). As of this date, no action has ensued at the national level, although counsel understands some railroads and local committees have reached local agreements, as have the parties to this action. The court's order of January 5, 1970, in effect, of course, resolved, at least as to these parties (and only as to them), any questions as to whether the negotiations would be handled locally or nationally, although this is not in dispute here.

ARGUMENT

The petition for certiorari should be denied for the following reasons:

a) The issue on appeal is the propriety of a preliminary injunction barring a strike. The dispute over which the strike began has been settled, and the dispute is moot.

b) The injunction was for a limited duration and has already expired by its own terms.

c) What has been appealed is a preliminary injunction, in which the District Court has wide discretion to operate upon the facts then at hand. The Fifth Circuit Court of Appeals unanimously affirmed the District Court order upon precisely that ground.

d) Most of the issues presented as "questions" by petitioners are essentially fact issues (Petitioners' Questions I, II, IV and V).

e) The remaining issue is whether the District Court properly balanced the Norris-LaGuardia Act against the Railway Labor Act, based upon all the evidence before the Court. This, too, is essentially an evidentiary question, with broad latitude to the trier of facts.

f) Apart from being meaningless to the parties, there are no issues of national significance in this particular issue.

Mootness

To properly appreciate the mootness of this entire dispute, repetition of certain critical facts may be in order.

Subsequent to the affirmance of the District Court's Order by the U.S. Court of Appeals of the Fifth Circuit and after the filing by the Union of its notice that it was

filing a petition for writ of certiorari (but before the petition was actually filed), and in spite of the fact that the dispute between the parties was still lodged before the National Mediation Board, representatives of the Union and the Carrier (acting as concerned business men, without the help of lawyers and professional mediators) met once again at the conference table and resolved their dispute by entering into a contract providing for an apprentice training program for the employees represented by the Union. A copy of this contract is attached as Appendix B.

The issue is moot for several reasons, but the first and most compelling reason is the simple fact that the entire controversy has its origin in the claimed failure of the Railroad to negotiate such a contract. Whatever the collateral issues may have been in the District Court, they arose solely by virtue of the alleged failure of the Railroad to negotiate in good faith with the Union toward the making of a contract. Whether in the first instance, the Union was at fault, or the Carrier was at fault, or whether the Carrier was entitled to relief, making these judgments now becomes an academic exercise for the reason that the fault, if there be any on either side, has been erased by the entry of the parties into the contract covering the subject matter of this litigation. Thus, not only did the parties get on the track prescribed by the Railway Labor Act, as directed by the District Court, they stayed on the track and reached the terminal at the end, and the contract envisaged by the Act (and we might add, undoubtedly contemplated by the District Court in its wisdom) has resulted and there is no longer any dispute between the parties. There is no basis for the Union to now strike on any of the grounds which formed the initial basis of this dispute and which were appealed and whether this Court affirms or disaffirms the Court below cannot make the least practicable difference to either party. Should

this Court reverse this decision, that would not undo the contract which has been signed. What is before the Court is, as a practical matter, merely a lawyer's technical debate about whether the Courts below used the proper reasoning in making the parties adhere to the Railway Labor Act. If there is any real concern of the parties about this matter (other than the concern of their counsel to be vindicated) it can only be to acquire ammunition for some future round in the eternal railroad-union story of marital discord on some other issue. It is difficult to imagine a more classic case of a moot proceeding. On such a basis, clearly a writ of Certiorari should not be granted. See **Oil, Chemical & Atomic Workers In'tl Union v. Missouri**, 361 U.S. 363, 4 L.Ed.2d 373, 80 S.Ct. 391 (1960).

The second major reason why this proceeding is moot lies in the wording and nature of the injunction itself. At the risk of being repetitious, it should be stated again in full:

> "Accordingly, an injunction will issue against the Union until the statutory procedures have been followed and further order of the Court, and both parties shall proceed forthwith to make a good-faith effort to settle in conference their differences with regard to all bargainable proposals for changes which the Union served upon plaintiffs in November, 1965."[3]

It should be noted that there is a definite time limit to the injunction, namely "until the statutory procedures have been followed". Before discussing the only logical interpretation of that phrase, we should briefly review the bargaining procedure under the Railway Labor Act. The

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[3] It should be noted that although the injunction is not particularly precise as to what acts it barred (apart from the question of duration), all the parties at all stages below have clearly understood and proceeded on the assumption that it does bar a strike by the union over the issue in dispute.

first step is that "All disputes between a Carrier of Carriers and its or their employees shall be considered, and, if possible, decided with all expedition, **in conference**, between representatives . . ." Section 142, Second, of the Railway Labor Act, 45 U.S.C., Section 152, Second (emphasis added). If the "in conference" discussions are unsuccessful, then either party may move the negotiations to either the National Railroad Adjustment Board or the National Mediation Board and if to the latter, then possibly on to first, arbitration, and finally, to a Presidential Emergency Board, if one should be appointed (45 U.S.C., Sections 153, 154, 157 and 160).

Thus, it is clear that the words "in conference" are words of art in the Railway Labor Act. It is equally clear that the two-party phase of the negotiations has been concluded. As a matter of fact, this occurred before June 29, 1970, as shown by a subsequent Order of the District Court which was a result of an effort by the Union to have the Carrier cited for contempt for failing to negotiate while the case was pending appeal in the Fifth Circuit. In the Court's Order (Appendix A), the Court expressed

> ". . . extreme doubt whether it has any jurisdiction, at this stage, to go back to an antecedent stage of the proceedings [the 'in conference' stage] and consider whether or not there had been negotiations or whether such negotiations were conducted in good faith . . . The parties being still in the process of going through these stages, the Court declines at this time to usurp the functions of the Mediation Board by going back and making evidentiary findings about antecedent negotiations."

Thus, if the District Court was dubious of its jurisdiction to enforce its injunction beyond the "in conference" stage of negotiations, it must have certainly had consid-

erable doubt whether the injunction in fact existed at that time. And clearly, if the Court had doubt as to the continued vitality of an injunction, it can hardly have been an injunction which, in fact, restricted the Union from striking, for it is the essence of an injunction that before one can be penalized for violating it, there must have been a clear notice to the alleged violator that the conduct complained of was prohibited at the time the alleged violation occurred. Any doubt, of course, as to whether or not the injunction has expired would have to be resolved in favor of a limiting construction. See **Terminal Railroad Ass'n v. United States**, 266 U.S. 17, 69 L.Ed. 150, 45 S.Ct. 5 (1924). If the strike injunction did not exist in fact or law on June 29, 1970, it clearly cannot exist now. That the prohibition against striking was to last only as long as the compulsory injunction to negotiate is the only reasonable interpretation that can be placed upon the Trial Court's final sentence.

This precise argument was raised below in a Motion to Dismiss the Appeal made to the United States Court of Appeals for the Fifth Circuit, but that Court did not expressly rule on the Motion to Dismiss, although it consumed by far the major part of the oral argument before that Court.

Similarly, a second argument in the Court of Appeals as to mootness was made on the ground that since the National Mediation Board had assumed jurisdiction of the dispute, as was shown conclusively by the District Court Order of June 29, 1970, the Union could not lawfully strike in any event even if the injunction were dissolved. It is an elementary proposition that so long as the National Mediation Board has jurisdiction of a dispute, neither party may unilaterally withdraw from negotiations and lawfully strike. Thus, even if the injunction had been dissolved below or were to be dissolved by this Court,

that fact would not allow the Union to strike so long as the matter was before the National Mediation Board.

An alternative, and equally compelling ground for showing the mootness of the present dispute before this Court, is that having in both the District Court and the Court of Appeals taken the position that the injunction had on its face already expired, the Carrier would be estopped from seeking to enforce the injunction should the Union proceed to strike in defiance of it. Thus, there is no threat of enforcement, and the Union cannot legitimately claim that the existence of this injunction endangers it, for it now exists apparently only because of the reluctance of the Union to lose its foundation for this appeal. The District Court continued the injunction only until "further order" of that Court, which further order the Union can have for the asking.

It might be suggested that even if the settlement of the underlying dispute has made the existence of the no-strike injunction a moot issue, petitioner has a remaining question which is not moot. This is the alleged question concerning the correctness of the trial court's "holding" that the BLE contract does not infringe on the conditions of the firemen's service.

Petitioners' Second Question, discussed at page 26 of the Petition for Writ of Certiorari, states that this question is really only "a separate and independent justification for the strike and a separate reason that the injunction was unlawful". While Petitioner in the Court below prayed "That the plaintiffs be temporarily and permanently enjoined from continuing in force or implementing in any way the July 26, 1969 agreement with the Brotherhood of Locomotive Engineers, or any program under it" (App. 65), the Court's failure to grant the relief requested was specifically not appealed by Petitioner from the Trial Court. The appeal to the United

States Court of Appeals for the Fifth Circuit was only from "That portion of the Order dated January 5, 1970, which preliminarily enjoined the defendants from striking" (App. 150). The alleged finding contested in Appellant's Question No. II, in addition was only one of fact found to the extent necessary to support the preliminary injunction which was appealed. Whether it did or did not justify the injunction becomes irrelevant if the injunction itself has been dissolved by the corrosion of time into a nullity. Hence the "Second Question" is not an independent question for review, but is moot, as are the four other questions initially posed by petitioners.

Summary of Argument on Mootness

This is an appeal from the grant of a preliminary injunction. It was unanimously affirmed by the Fifth Circuit. On its face it has already expired when compared to subsequent events. As a matter of law it has expired. As a matter of fact, it enjoins a strike over a dispute that has been completely and voluntarily terminated by the parties to the dispute and this action. Whether this Court affirms or reverses the Court below cannot be of the least practical difference to either party, as it will not revive their initial dispute. There is not a particle of difference between the case at hand and McLeod v. General Electric Co., 385 U.S. 533, 17 L. Ed. 2d 588, 875 S. Ct. 637 (1969), where after the parties agreed upon a new labor contract, this Court held that it would not be appropriate subsequent to that event to determine the proper construction of the National Labor Relations Act which one of the parties had allegedly violated by refusing to bargain. The petition should be denied in order that the parties may apply for the proper procedural remedy in the District Court to have this case finally terminated.

Certiorari Should Not Be Granted on a Preliminary Injunction Absent a Clear Error

As has been mentioned, none of the four judges who have considered this case have yet found the errors complained of by petitioners. This was a preliminary injunction, where the judgment of the trial court is traditionally given the widest latitude.

Let us review the alleged errors of law made unanimously by the four judges who have considered this case heretofore in the order of the "Questions Presented" by the petitioner.

Question Number I.

"Whether the Court below erred in holding that a union should be enjoined from striking because of a failure to have meaningful Railway Labor Act negotiations where the failure to have such negotiations is attributable solely to the carrier's actions to frustrate negotiations."

The most obvious feature of this question is that it is purely a fact question. There was evidence on both sides as to why there had not been negotiations. But the record was clear that the last communication known to have been received by either party was a letter sent by the National Railway Labor Conference on November 7, 1969, which offered a date and place to meet to discuss Notice No. 3. Whatever may have happened prior to November 7, 1969, and whether or not respondents did or did not make every effort to settle the dispute prior to that date, the fact remains that on November 7, 1969, the railroad's bargaining agent had made an offer to sit down and negotiate. For the petitioner to prevail on this theory, he must change the Norris-LaGuardia Act to make it read:

> "no restraining order or injunctive relief shall [ever] be granted to any complainant who has [ever] failed

> to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has [ever] failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

In short, instead of the common sense approach of "who washed last" of the Norris-LaGuardia Act, petitioner proposes to make the Norris-LaGuardia Act into an absolute "clean hands" test—if the party seeking the injunction **ever** failed to do something in the past, regardless of his recent efforts, he cannot enjoin a strike and the parties are left to fight it out by the law of the jungle. Such a reversion may be petitioner's true aim, but it is hardly consistent with the measured processes of the Railway Labor Act, or indeed consistent with the reasons why we even have a Railway Labor Act.

There is only one contention in petitioner's first question that has any real merit to it. On page 15 of the petition it is noted that "The District Court did not find the carrier had perfected its right to equitable relief." It may be, that under a strict interpretation of Rule 52 of the Federal Rules of Civil Procedure, the District Court should have made the express finding which the evidence would have warranted: That the carrier was willing to negotiate on November 7, 1969, and thereafter until the moment of the strike, and thus had perfected its right to equitable relief. But a failure to make every finding of fact is not normally the basis for seeking a reversal of the grant of a preliminary injunction. On a preliminary injunction, the question is usually one of finding where the merits appear more likely to fall upon the final trial of the case, and it is not necessary to find every fact that would support a permanent injunction with finality on a mere hearing for a preliminary injunction. This is particularly so when

that fact is highly disputed itself and there is conflicting evidence, as there was on the matter at hand. It may well be, although there is no evidence on the record to support this, we may say candidly, that the District Court deliberately did not put down its finding in its order for the very practical reason that to have made such a finding when the parties had concededly not even begun to negotiate, would hardly be conducive to creating a climate in which negotiations would be productive.

Perhaps it is difficult to completely grasp the situation which existed at the time the Court issued its preliminary injunction, but some of the comments from the Court in that proceeding are certainly illustrative of the objective the Court was trying to reach:

> "The Court: Well I think there must be something in the law that permits the Court to do something intelligent once in a while.
>
> Mr. Gibert: We don't think enjoining our strike is certainly what it is. The law provides that they can negotiate.
>
> The Court: Looks like somebody's going to have to handcuff both of you and sit you down at the table.
>
> Mr. Gibert: Well I'll be happy to sit down, your Honor, but not while there is an injunction and not while they've got this other deal in effect.
>
> The Court: This reminds me of a divorce case" (App. 196).

Clearly the Court was concerned with cutting through the animosities that had built up over the years over this issue and in getting the parties to the negotiating table. What purpose then would a finding that one party or the other had been at fault in 1965 or 1966 or 1967 have served? If the railroad had perfected its right to equitable relief on November 7, 1969, by offering to negotiate, that was all that was important.

Attempting to assess blame for ancient history would not have accomplished a single thing, and probably would have been detrimental to the broader objective the Court was trying to reach. As noted previously that objective has been reached—a contract has been signed and the dispute terminated. Therein lies the evidence that the course adopted by the District Court in deliberately not making the specific finding was the correct one.

Question Number II

"Whether the Court below erred in holding that the agreement between the Carrier and another union (Brotherhood of Locomotive Engineers), and its implementation, did not constitute a change in the terms and conditions of employment of the appellants' firemen, where the agreement, and its implementation, had an adverse effect upon the firemen's seniority and "historical expectation of promotion to the job of engineer."

This is purely a question of the construction of the BLE-Carrier contract. It should be noted that in this case there has been no National Railroad Arbitration Board finding as to what that contract does or does not mean and whether or not it does or does not represent a breach of the existing firemen's contract. If it was, it could only be at the most a minor dispute. But clearly the District Court's determination, for purposes of issuing an injunction only, of what that contract does or does not mean is hardly a matter for review by this Court. Certainly would this be the case on the very minimum record we have here as to the conditions of employment of the respondent's firemen and the extent, if any, to which the BLE-Carrier contract interfered with the firemen's expectations.

If it is correct to make the Court's failure to find a particular fact a basis for reversal in this case, then the

same might be noted with regard to this question. The District Court made no finding that the firemen on **this** railroad had any particular "historical expectations of promotion to the job of engineer." Petitioner does not tell us where that quote originates, but the words appear not in the record in this case, but from the decision in **BLF & E v. NMB**, 410 F.2d 1025, at 1032. Petitioner cannot warp facts from different cases between different parties into this case by the mere assertion that they are so. This is a relatively small railroad and what the expectations, if any, of its firemen were, and what the alternative sources of engineers were for this railroad in the historical past has hardly been touched on the record so far.

In any event, interpreting a contract (in this case the BLE contract) is exclusively a function of the National Railroad Adjustment Board. **Order of Railway Conductors v. Pitney**, 326 U.S. 561, 90 L.Ed. 318, 66 S.Ct. 322 (1946). To claim as a ground of appeal that the District Court did not interpret the BLE contract correctly is to proceed on the premise that it is the function of the District Court to interpret railway labor contracts. The premise being incorrect, the conclusion must be likewise faulty.

Question Number III

"Whether the Court below erred in holding that the Union should be enjoined from striking because of the failure to have Railway Labor Act negotiations where the Carrier instituted unilateral changes in working conditions (directly related to the subject matter of the Union's Section 6 Notice), while refusing to negotiate with the Union."

Here again, we have nothing but a disputed fact question, which the Court failed to find as the union contended, namely that the railroad had changed the working condi-

tions of the firemen. Here again, there was substantial evidence on both sides, although we prefer to believe that the majority of the evidence was on the side of the railroad. In any event, these contentions again involve interpretations of both the firemen's contract, and the engineers' contract, and there is certainly a very minimum record other than the face of the contract to support these contentions. The Fifth Circuit unanimously found that the District Court had not made a clearly erroneous finding on the issue, after this same ground had been urged upon it, and there would seem to be little reason why the petitioner should expect this Court to reach a different result.

Question Number IV

"Whether in issuing the preliminary injunction against the strike the District Court failed to give proper force and effect to Section 8 of the Norris-LaGuardia Act, and whether in affirming the Order of the District Court the Court of Appeals similarly erred?"

Again, the petitioner proceeds upon the assumption that the Norris-LaGuardia Act says something it doesn't say, namely that which is set out above. There is no bona fide dispute here between the courts or the parties on the relationship of the Norris-LaGuardia Act to the Railway Labor Act. The District Court injunction was clearly issued to carry out the Railway Labor Act. The evidence was clear before it, and all the parties conceded, that no negotiations had taken place, but both parties contended that they wanted to negotiate. The only flaw was that both wanted pre-conditions to negotiations which were not acceptable to the other. The Court cut through all the conditions, and ordered the parties to negotiate in accord with the Railway Labor Act. Having ordered them to negotiate, the Railway Labor Act itself forbids the parties to change the status quo or to strike. Thus, having

had their feet firmly set along the negotiating track laid down by the Railway Labor Act, the Union was barred from striking, not only by the injunction, but by the Railway Labor Act itself. Once negotiations had started, the Railway Labor Act itself would have been sufficient to prevent the union from unilaterally withdrawing from negotiations and beginning an illegal strike. If it is feasible to reconcile Norris-LaGuardia and the Railway Labor Act by forbidding a strike until the negotiating track has been followed to the end, why is it not proper for a court to order the parties to negotiate and in the same breath and as part of the same order, order a union not to strike until it has exhausted the negotiation route described by the Railway Labor Act. Indeed, having mandatorily ordered the parties to negotiate under the Railway Labor Act, the injunction became pure surplusage. Undoubtedly it was issued because of the union's expressed desire to have a strike on while they negotiated, but technically, if the Court had been able to assume that the parties would comply with the Railway Labor Act, there would have been no need to even issue the injunction against the strike. Thus, to argue that the Court did not properly apply the Norris-LaGuardia Act is to show a total lack of comprehension of what the Railway Labor Act says to begin with.

Question Number V

"Whether the District Court injunction and the Court of Appeals' affirmance constituted error where the Carrier's simultaneous (a) negotiation of an agreement with the Brotherhood of Locomotive Engineers, and (b) refusal to negotiate with Appellant, on a matter in which both unions had an interest, were for the purpose, and had the effect, of influencing the employees in their choice of representative in violation of Section 2 of the Railway Labor Act?"

Petitioner's fifth question, which is spelled out with more clarity on page 31 of the Petition, "The real purpose of the carrier is to destroy the UTU . . . ." is clearly only a make-weight. There was not a shred of evidence advanced by the union at the hearing to support this contention. The only evidence that was offered, in fact, was that of the Personnel Director of the carrier. The following interchange took place while on cross-examination:

> "Mr. Gibert: [for the union] And you said you would have been willing to negotiate if anybody had just wanted to negotiate, right? Is that what you said about Notice No. 3?
> A. Yes, sir. I would negotiate with the BLF & E just as quickly as we would with the BLE. I have no choice as to unions, Mr. Gibert. As a matter of fact, one is just as troublesome as the other, to me personally" (App. 339-40).

This must be one of the classic comments in the history of labor management court cases, but it is the only evidence on the record as to whether the railroad management preferred one union to the other. It certainly does not support the position taken by petitioner here.

Since it has been ruled in **BLF & E v. NMB**, supra, that carriers have an obligation to bargain with both unions over apprentice engineer training programs, it would seem axiomatic that it may be possible to reach an agreement with one ahead of the other. How then can the making of an agreement with one union be considered as a matter of law, rather than a mere allegation, to be a preference of a chosen union.

Indeed, petitioner has not always been entirely consistent in its view on the BLE-carrier contract. The Union has previously argued that the BLE contract is not even a contract. Witness the following observation:

> "Mr. Gibert: In the first place, I disagree with my brother here in that they are not contractually bound in that the agreement with the Brotherhood of Locomotive Engineers lets them do anything they want to, which includes suspending the program if they want to" (App. 179-80).

How then can it be an act of favoritism to make a non-contract, a nullity, with another union?

There Is No National Issue in This Case

All of petitioner's questions and points of argument in this case must essentially come down to the question of whether this Court should consider this case at this time. All that is on appeal is a preliminary injunction, which has already completely run its course so far as these particular parties are concerned. However, even though a case might be moot in fact as to the parties before the Court, it is recognized that the Court might well wish to consider the case if it involved a matter of significance to more than these parties. This is not such a case.

The evidence is undisputed that this railroad in fact followed the pattern followed by the other railroads in dealing with the BLF & E/UTU Notice No. 3, served on November 15, 1965. That is to say, they initially took the position that it was premature, unbargainable, and inappropriate to negotiate it inasmuch as the same matter was in litigation with the BLE. And like most of the other railroads, respondents more or less let the matter lie on the back burner while **Akron** and **BLF & E v. NMB** proceeded on their leisurely way. Then, when all the litigation had terminated, and everyone was aware of what each party's rights and obligations were, the railroads made a good faith effort to open negotiations. So far, again, the picture is common among almost all of the nation's railroads. At that point, this railroad was met with a strike,

which was met in turn with a temporary restraining order and finally this preliminary injunction. Had not the other railroads and the union committees on the other railroads moved on independently of this strike, conceivably this case might now have some significance to parties other than those before the Court. However, events have not stood still. On November 19, 1969, the National Railway Labor Conference, on behalf of almost all the railroads, including respondents, on a national basis requested the services of the National Mediation Board (App. 18-50). The union initially opposed national mediation on this matter (App. 50-58), and the matter has not been docketed or accepted for handling by the Board. However, a number of other railroads have, like respondents, worked out local agreements pending a possible national settlement of this issue. Thus, it is clear that in one way or another all the other railroads have moved this matter on and hence the status quo that existed on November 15, 1969, on this railroad is no longer applicable anywhere else.

Not only is this the case, but quite apart from events subsequent to November 15, 1969, events prior to that date were testified to which were peculiar to this railroad and this railroad only. Critical among these was a letter sent from the general grievance committee of the BLF & E for respondents and respondents only on February 22, 1966, which states in relevant part:

> "Your letter of February 14, 1966, suggests that we meet for a discussion of this matter, and we wish to point out that our three (3) separate proposals have already been a subject of conferences on the property and these conferences have been terminated. I cannot permit these conferences to be reopened, and hence our meeting must be limited to discussion of the carrier's notice alone" (App. 405-06).

This letter was sent to respondents, and concerns the Notice No. 3 over which this strike was allegedly commenced. Although there was a great deal of testimony in an effort to explain away this letter, certainly the words seem to have some ordinary significance, and the Court obviously had substantial grounds for not finding that it was solely due to the railroad's fault that no negotiations had been had on the union's Notice No. 3. Not only this letter, but other alleged conversations between railroad and union officials pertaining to Notice No. 3 would have been peculiar only to this railroad and this general committee, and have no relationship or bearing on what might have taken place on other railroads at different times.[4]

In summary, this matter is of no real concern to either the national union or the other railroads of the nation, and since it is no longer even of any great concern to the parties involved, there really seems to be very little reason for this Court to be concerned about it either.

There Is No Conflict With Previous Decisions of This Court or With Other Circuits

Petitioner contends in passing that the decision below conflicts with the decision of this Court in **Brotherhood of Railroad Trainmen v. Toledo, Peoria and W.R.R. v. United**

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[4] This is also the view of the union in this case as shown in the following interchange:

"The Court: Are you willing to negotiate in this national arena?

Mr. Gilbert: No. sir.

The Court: Why not?

Mr. Gilbert: The AWP is not like the others. The other railroads did not start an apprentice. Only the A&WP and the L&N. And the other hundred railroads which are represented by the Railway Labor Conference have got different issues . . . But the L & N had got an apprenticeship program with the BLF&E, and we had got—and the A&WP had an apprenticeship program with the BLE, and all the others are different." (App. 206-07)

Transportation Union, 321 U.S. 50, 88 L.Ed. 534, 64 S.Ct. 413 (1944). There is no conflict with the Toledo case presented here. In Toledo, the negotiations had gone through mediation and the carrier had declined to submit to voluntary arbitration. A strike ensued, accompanied by violence. It should be carefully noted that the strike itself was perfectly lawful under the circumstances, while, of course, the accompanying violence was not. But in the very heart of the opinion in Toledo is found the following comment:

> "Arbitration under the Railway Labor Act was available, affords the method of settlement Congress itself has provided, and **until** respondent accepted this method it had not made 'every reasonable effort to settle' the dispute, as Section 8 requires." 321 U.S. at 65. (Emphasis added.)

Clearly this Court itself in Toledo foresaw that it would not be necessary to examine every action of the past decade to determine whether a plaintiff in court had the clean hands necessary under Norris-LaGuardia. It was only the state of grace at the moment relief was sought which mattered. Reasonably, this is the only way in which the major objectives to the Railway Labor Act can be reached. Certainly over the years, virtually all the railroads and unions generally have taken some preliminary positions that have ultimately not been sustained in Court. There is always at least one loser in such litigation. To rule that the victorious side may immediately always proceed to self-help and do away with the Railway Labor Act, if it believes that self-help will be more effective than negotiations in convincing the losing party to yield, is to invite open warfare and the law of the jungle in an industry which Congress has recognized is specially vested with a public interest.

Indeed, any remaining doubt as to the duty resting upon both parties to negotiate in spite of past conduct

has now been settled by the very recent decision of this Court in **Chicago & N. W. Ry. Co. v. United Transportation Union**, decided on June 1, 1971, Supreme Court Docket No. 189 (unpublished), wherein this Court declared the obligation of the parties to negotiate to be a continuing one, not only throughout the processes of the Railway Labor Act, but continuing in fact even after the formal processes of the Act have been completed and the parties are otherwise free to exercise self-help.

So far as the case of **The Detroit and Toledo Shore Line R. R. v. U.T.U.**, 396 U.S. 142, 24 L.Ed.2d 325, 90 S.Ct. 294 (1960), is concerned, its relevance in this dispute is only to support the railroad's position. Absent a showing that the railroad had somehow changed the objective conditions under which the firemen were working, which has not been shown to any of the four judges who have looked at this case so far, all that Shore Line says is that the parties must retain the status quo while negotiations are going on. This would include as part of the status quo that existing labor contracts must be honored, and strikes may not be commenced. Thus, once negotiations had begun, as ordered by the Court, Shore Line teaches that the injunction became in fact superfluous, as the union was not then free to strike in any event. (Of course, it could have struck in fact, although such a strike would have been unlawful, but such a strike could have been properly enjoined upon the grounds of its then unlawfulness.)

Nor is there any significant conflict among the circuits here. Petitioner asserts in its introduction that there is one, but careful reading of the petition fails to support this. To be sure, in **Rutland Ry. v. Brotherhood of Locomotive Engineers**, 307 F.2d 21 (2nd Cir. 1962), the Court there held that before issuing an injunction the District Court should have made a finding of fact that the railroad had gone the last mile in seeking to negotiate the matter. That sounds as if it is in conflict with the decision in this

case, but when the District Court opinion is read, at 188 F. Supp. 721 (D.Vt. 1960), it readily appears that this was in fact a permanent injunction which was issued. In that case, of course, a finding properly should have been made in accord with Rule 52 of the Federal Rules of Civil Procedure. This is only a preliminary injunction and so there is no real conflict here. The majority in Rutland also noted (307 F.2d at 41), that "We cannot determine from the record alone, without the benefit of observing the witnesses, whether the extent of these discussions met the standard we find is imposed by the Railway Labor Act." Here, of course, the critical question is the effect of the letter of the National Railway Labor Act." Here, of course, the critical question is the effect of the letter of the National Railway Labor Conference of November 7, 1969, upon which there were no witnesses, and the Court of Appeals could read the letter as well as the District Court. Thus, there was no need to have an evidentiary hearing on remand, even if the Fifth Circuit Court of Appeals had adopted the view apparently urged by petitioner that a finding of fact should have been made even on a preliminary injunction. This being the case, the facts were as fully before the Court of Appeals as they were the trial court, and there was no error affirming the District Court opinion. In any event, in quoting in part from a dissenting opinion in Rutland, the trial court undoubtedly considered the intrinsic merit of the opinions most carefully and with due respect for the authors.

CONCLUSION

The issue which is on appeal is whether the Court erred in enjoining a strike by issuing a preliminary injunction. Petitioners assert in the Conclusion of their petition that

> "The history of this dispute shows that there will never be negotiations with respect to Notice No. 3 until the union is free to resort to self-help. As soon as a non-enjoinable strike takes place, the parties will negotiate an agreement, not before. When that happens, some measure of peace may come to the industry."

In other words, the union's position, at least before this Court, is that the only way the railroad will ever bargain on this question is for the union to be free to strike and do anything else which may occur to the members or leaders. Unhappily, the facts stand in sharp contrast to the assertion. Indeed, they show that as a practical matter, if the Court were to reverse the decision below, it would not now make any practical difference to either party.

While this may sound strange coming from the prevailing party below, which did obtain the injunction it sought, any other statement would be false. The railroad and the union have reached an agreement over exactly the Notice No. 3 which was the *cassus belli* of this dispute. This agreement was signed on May 7, 1971, and is the culmination of negotiations that have been going on ever since this injunction was granted.

Thus, all that is left for this Court to decide is the rather sterile question of whether the District Court was correct in enjoining the strike and in ordering negotiations to proceed back in 1969. Should this Court decide the Court below was in error at that time, it certainly would not undo this contract, nor could such a decision stand as anything more than an essay on Railway Labor Law, utterly devoid of any practical effect so far as these parties are concerned. Such a case does not seem to be one upon which this court should exercise its discretion and grant certiorari.

Four judges have considered this matter, fully and exhaustively. None have found merit in these same arguments. There is no national issue here, no conflict among the Circuits; no variance among the Circuits. What can possibly result from stirring the case again? Let certiorari be denied and the injunction can be dissolved by the District Court, its purpose in life completed.

Respectfully submitted

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